JAN 07 1993

93-670

Supreme Court, U.S.
FILED
OCT 28 1993
OFFICE OF THE CLERK

93-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
AND
APPENDIX TO PETITION**

Charles Sovel
Freedman and Lorry, P.C.
Continental Building,
Suite 900
400 Market Street
Philadelphia, PA 19106
(215) 931-2500
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

2. Does not proof of the specific practice of the crew of a ship of observing cargo loading operations give rise to a duty of care with respect to hazardous conditions which such observations would be reasonably expected to disclose?

TABLE OF CONTENTS

	Page
Questions Presented	
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Legislative History Involved	3
Statement of the Case	4
Reasons Why the Writ Should Be Granted .	7
1. The law in the Third Circuit relating to unsafe conditions existing in a cargo stow, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), not only is in conflict with the law in the Fourth, Fifth and Ninth Circuits, but eviscerates the Congressional intent of encouraging vessel safety by providing longshore men with a fault based negligence remedy.	7
2. The holding of the Third Circuit that evidence of the practice of the crew of a vessel to observe cargo loading operations does not create a duty of care with respect to conditions which might be reasonably discovered by such observations is in conflict with this court's decision in *Scindia Steam Navigation Company v. De Los Santos, supra.* . .	15
Conclusion	17

TABLE OF CONTENTS

APPENDIX

	Page
Opinion of the United States District Court for the Eastern District of Pennsylvania dated October 1, 1992	1a
Order of the United States District Court for the Eastern District of Pennsylvania dated October 1, 1992	5a
Order of the United States District Court for the Eastern District of Pennsylvania dated October 2, 1992	6a
Opinion of the United States District Court for the Eastern District of Pennsylvania dated November 23, 1992	7a
Order of the United States District Court for the Eastern District of Pennsylvania dated November 23, 1992	9a
Judgment Order of the United States Court of Appeals for the Third Circuit dated June 30, 1993	10a
Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing in Banc	12a
Excerpt from Testimony of Albert Howlett	14a
Excerpt from Testimony of Captain Daniel Cafena Campos	16a
Legislative History of Section 5(b) of the Longshore and Harbor Workers' Compensation Act	18a

TABLE OF AUTHORITIES

	Page
Davis v. Kambara Kisen Co., Ltd., Civil Action No. 88-7245 (E.D.Pa., July 31, 1990), 1990 U.S. Dist LEXIS 9898	12
Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988)	6, 7, 10, 11, 12, 13, 14, 15, 16
Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982)	11, 15
Irby v. Tokai Lines, Civil Action No. 88-6890 (E.D.Pa., Feb. 23 1990), 1990 U.S. Dist LEXIS 2116	12
Marine Terminal v. Burnside Shipping Co., 394 U.S. 404, 415 (1969)	10
Mullen v. Hoyu Kaiun Kabushiki Kaisha, Civil Action No. 88-8311 (E.D.Pa., April 26, 1990), 1990 U.S. Dist LEXIS 5045, *affirmed by Judgment Order*, 922 F.2d 832 (3rd Cir. 1990)	12
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956)	8
Scindia Steam Navigation Company v. De Los Santos, 451 U.S. 156 (1981)	7, 8, 10, 14, 15, 17

	Page
Somenski v. Companhia de Navegacio Lloyd Brasilerio, Civil Action No. 90-2737 (E.D.Pa., April 30, 1992), 1992 U.S. Dist LEXIS 6565, *affirmed by Judgment Order,* ___ F.2d ___ (3rd Cir. Oct. 23, 1993)	13
Thomas v. Kambara Kisen Co., Ltd., Civil Action No. 88-7243 (E.D.Pa., Feb. 12, 1990), 1990 U.S. Dist LEXIS 1440	12
Turner v. Japan Lines, Ltd., 651 F.2d 1300, 1304 (9th Cir. 1981) .	8, 11 12, 15
Whitfield v. Craigwin Co., Ltd., 727 F.Supp. 183 (E.D.Pa. 1989) . . .	12
Woods v. Sammisa Co., Ltd., 873 F.2d 842 (1989), *cert. denied*, 493 U.S. 1050 (1990) . .	11, 13 15
Longshore and Harbor Workers' Compensation Act, 33 U.S.C., § 901, *et seq.*.	8
Section 41 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.S., § 941	7, 8
Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) , , , , , ,	7
Legislative History of Section 5(b) of the Longshore and Harbor Workers's Compensation Act	9, 14 15

	Page
Section 412 of the Restatement of Torts, Second	9
Rule 406 of the Federal Rules of Evidence .	16

93-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Petitioner, Albert Howlett, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered June 30, 1993, affirming the granting of Summary Judgment in favor of respondent in the within proceeding, and the Order of the United States Court of Appeals for the Third Circuit entered July 30, 1993, denying petitioner's

Petition for Rehearing in Banc, and in support thereof represents as follows.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania is officially reported at 998 F.2d 1003 (3rd Cir. 1993) and is reproduced in the appendix hereto at page 10a.

The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing in banc is not officially reported and is reproduced in the appendix hereto at page 12a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania granting Summary Judgment against petitioner is not officially reported and is reproduced in the appendix hereto at page 1a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania denying petitioner's Motion for Rehearing is not officially reported and is reproduced in the appendix hereto at page 7a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on June 30, 1993. The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing in Banc was entered July 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 28 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm.News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins at page 4701, and is reproduced in the appendix hereto beginning at page 18a.

STATEMENT OF THE CASE

This case was decided in the court below on a motion for summary judgment. There was evidence in the record to establish the following facts:

Petitioner was injured while working as a longshoreman and engaged in discharging a cargo of cocoa beans from the No. 2 hold of respondent's ship. Petitioner was injured when he stepped down off the cargo, a distance of approximately three feet, to an area of the deck of the ship from which cargo had just been removed. When he stepped down into this space, he slipped and fell suffering severe injury.

The cause of petitioner's slipping and falling was the presence on the deck of a sheet of clear plastic covering the area of the deck from which the cargo had just been removed. It was conceded by the respondent that the sheet of plastic should not have been under the cargo. There also was evidence that petitioner had not been warned of the presence of the plastic, did not see it, and had no reason to anticipate that, in stepping down onto the deck, he would be stepping onto a slippery surface created by the presence of the sheet of smooth plastic on the deck.

There also was evidence to establish that the presence of plastic on the deck underneath the cocoa beans was improper and not a normal condition which longshoremen should be expected to anticipate. On the contrary, it was admitted that the practice was to have paper or wood under the cocoa beans, which, if present, would not present a slippery walking surface.[1]

---

1. The area onto which Petitioner stepped was approximately eight feet by eight feet. There was evidence that the plastic was a clear plastic, was dirty and had debris on it. Petitioner testified that he thought he was stepping down onto paper which normally would be placed on a deck under cocoa beans (14A-15A). For this reason, the presence of the plastic on the deck was not "open and obvious" to Petitioner.

The evidence further established that the plastic had to have been placed under the cocoa beans by the loading stevedore in Guayaquil, Ecuador, where the cocoa beans had been loaded aboard the ship. With respect to the placing of the plastic under the cocoa beans, there was evidence that the ship *required* that the loading stevedore place some material on the ship's steel deck under the cargo of cocoa beans to prevent condensation damage, *that this material was supplied to the loading stevedore by the ship,* and normally was wood or paper. However, the ship carried rolls of the type of plastic that was on the deck under the cocoa beans as part of its ship's stores, and, therefore, respondent *admitted* that it had supplied the loading stevedore with the plastic that was under the cocoa beans at the time petitioner was injured.

There also was evidence as to the practice on the ship of the ship's crew to observe cargo loading operations, including testimony that if plastic had been placed under the cocoa beans at the time the cargo was loaded, the crew of the ship would have seen it and would have reported it to the ship's Captain or one of the ship's mates. This testimony came from the Captain of the ship, and was not simply testimony as to any general maritime practice of inspecting cargo operations, but, rather, was testimony as to the specific practice of conducting such inspections on this specific ship.[2]

---

2. The Captain testified:

> Q. . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?
>
> A. Normally be three sailors and one guard, an officer.
>
> . . . .
>
> Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoremen

Relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied.*, 496 U.S. 1007 (1988), which held that a shipowner had no duty of inspection to discover unsafe conditions existing in a cargo stow loaded by a foreign stevedore, the District Court held that the fact that the shipowner in this case had supplied the plastic to the loading stevedore was not sufficient, within the requirements of *Derr*, to establish that the ship had *actual knowledge* that the plastic had been placed under the cocoa beans. On this basis, the District Court granted the shipowner's motion for summary judgment. The Third Circuit affirmed by Judgment Order without filing an opinion.

...Continued...

finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

. . . .

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

A. Affirmative. And he would have advised me or one of the ship's mate.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The law in the Third Circuit relating to unsafe conditions existing in a cargo stow, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), not only is in conflict with the law in the Fourth, Fifth and Ninth Circuits, but eviscerates the Congressional intent of encouraging vessel safety by providing longshoremen with a fault based negligence remedy.

As the decision below in the instant case demonstrates, the law in the Third Circuit, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), virtually destroys the longshoreman's negligence remedy because it relieves a shipowner from liability for a hazardous condition which the shipowner is in a position to discover and prevent, but which, at the same time, is unknown to the longshoreman or to his stevedore employer and, because it is unknown to them, is a condition which the longshoreman and his stevedore employer are not in a position to prevent.

In *Derr, supra*, the Third Circuit held that a shipowner had no duty to inspect the manner in which cargo was stowed aboard a vessel by a foreign loading stevedore for purposes of discovering hazardous conditions created in that cargo stow which might endanger a longshoreman subsequently engaged to discharge that cargo. The decision in *Derr*, on which the decision in the instant case is based, was predicated on two erroneous interpretations of this Court's decision in *Scindia Steam Navigation Company v. De Los Santos*, 451 U.S. 156 (1981).

In *Scindia*, this Court, citing Section 41 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.S., § 941, held the primary (although not exclusive) responsibility for providing a longshoreman with a safe place to work rested on his stevedore employer, see *Scindia, supra*, 451 U.S. at 170. The Third Circuit, in *Derr, supra*, erroneously extended this holding to apply to conditions created by a loading stevedore even though that loading stevedore

was *not* the injured longshoreman's employer and not subject to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., § 901, *et seq.* The principle error in the Third Circuit's decision in *Derr* is that it fails to recognize that there are several significant differences between a hazardous condition created by a stevedore who is not the injured longshoreman's employer and a hazardous condition created during the work being performed by the injured longshoreman's own employer.

First, a loading stevedore, usually foreign, who is not the employer of a discharging longshoreman, owes no duty to that discharging longshoreman to provide him with a safe place to work under § 41 of the Longshore and Harbor Workers' Compensation Act. Therefore, the underlying basis for this Court's decision in *Scindia* -- the presence of the Section 41 duty -- is not present in cases, such as the instant case, involving improper stowage by a foreign loading stevedore.

Secondly, while Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), eliminates the shipowner's indemnity action against a longshoreman's stevedore employer, *see Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), it does *not* preclude a shipowner from seeking indemnity against a stevedore who is *not* the plaintiff's employer, *see Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981). Thus, while a shipowner may not bring a *Ryan Stevedoring* indemnity action against an injured longshoreman's employer, it still may bring an indemnity action against a foreign loading stevedore and, thus, is protected if it should be held liable to an injured longshoreman for a condition created by the loading stevedore, *Turner v. Japan Lines, Ltd.*, *supra*.

Third, while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process, under basic principles of land side law, which are supposed to be applied in developing the longshoremen's

remedy under § 5(b) of the Act,[3] the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe conditions which might have been created as a result of that work.[4] Once the loading stevedore's work is completed and accepted by the ship at the loading port, where the shipowner would have the opportunity and ability to discover any hazardous condi-

---

3. Congress specifically addressed this point in the Legislative History to the 1972 Act as follows, see House Report No 92-1441, 1972 U.S. Code Cong. and Adm. News at page 4704 (18a):

> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

4. The applicable provision is set forth in § 412 of the Restatement of Torts, Second, as follows:

> **§412. Failure to Inspect Work of Contractor After Completion**
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them *by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed.* (Emphasis supplied)

tions which may have been created during the loading operation, there simply is no reason to excuse the shipowner from responsibility for the condition of the cargo stow.

The Third Circuit's decision in *Derr*, *supra*, equating the shipowner's responsibility for conditions created by a foreign loading stevedore with the shipowner's responsibility for conditions created during the work being performed by the injured longshoreman's stevedore employer not only is not dictated by this Court's decision in *Scindia*, but undermines the *Scindia* decision which is premised on the ability of the injured longshoreman's employer to prevent accidents. Under the Third Circuit's decision is *Derr*, as the instant case illustrates, the shipowner is relieved from responsibility for a hazardous conditions which are unknown to the injured longshoreman and his employer, while, at the same time, are capable of being discovered and corrected by the shipowner.

A second error in the *Derr* decision is its holding that the shipowner's duty under *Scindia* does not extend to a hazardous condition existing in a cargo stow because a cargo stow is not part of a ship's "work space", see *Derr*, *supra*, 835 F.2d at 495-496. In *Scindia*, *supra*, this Court, citing *Marine Terminal v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969), held that the shipowner's duty of care extended to the "condition of the ship's gear, equipment, tools and *work space* to be used in the stevedoring operations" (Emphasis supplied). The Third Circuit, in *Derr*, held that, since the foregoing quoted language from the *Scindia* decision did not specifically mention a condition of the ship's cargo, the shipowner had no duty of care with respect to the condition of a cargo stow, *see Derr, supra*, 835 F.2d at 495-496.

The Third Circuit's distinction between a cargo stow and a vessel's work space is an example of the proverbial distinction without a difference. In the context of cargo operations, it is impossible to distinguish between a condition of a cargo stow and a condition of the cargo hold (work space) where that cargo is stowed. Once cargo is stowed in the hold of a vessel, it necessarily becomes part of the

vessel's work space because it becomes the working surface on which the longshoremen must stand to perform their work. As the instant case illustrates, a longshoreman necessarily must stand and walk on cargo and must step off cargo onto the deck of the ship in the course of performing his duties. If something is placed on that deck of a ship on which a longshoreman must walk, such as the sheet of plastic in the instant case, it becomes part of the work space of the ship even though it also is part of the cargo stow. The Third Circuit's distinction between cargo and a "physical" work space of the vessel is simply illogical and unrealistic.

The decision below in the instant case, which is predicated on the *Derr* decision, is in conflict with decisions from at least three other Circuits. It is in conflict with the decision of the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, *supra*, (longshoreman injured as a result of improper shoring of cargo by foreign loading stevedore), a conflict which is recognized in the *Derr* decision itself, see *Derr*, *supra*, 835 F.2d at 494. It is in conflict with the decision of the Fifth Circuit in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848-849 (1989), *cert. denied*, 493 U.S. 1050 (1990), which was decided subsequent to *Derr* and specifically rejected *Derr*, (longshoreman injured as a result of improper stowage of pipe by a foreign loading stevedore), and is in conflict with the decision of the Fourth Circuit in *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1074-1075 (4th Cir. 1982) (longshoreman injured because "manner in which the cargo was stored precluded the stevedore from unloading it by any other means except one which was inherently dangerous").

Since the decision in *Derr*, *supra*, and leading up to the decision in the instant case, there have been numerous decisions in the Eastern District of Pennsylvania in which summary judgment has been entered in favor of shipowners on the basis of the decision in *Derr*. These decisions, for the most part, are not officially reported, and, when appealed, were affirmed by the Third Circuit by Judgment Order and without Opinion. They serve to illustrate how far the Third Circuit has gone in eliminating the longshoremen's negligence remedy.

In *Whitfield v. Craigwin Co., Ltd.*, 727 F.Supp. 183 (E.D.Pa. 1989), a longshoreman was injured when he fell through an improperly constructed wooden framework which had been erected by the foreign loading stevedore in conjunction with the stowage of cargo. Summary Judgment was granted the shipowner on the authority of *Derr*, *supra*, although it is clear that if this case had been brought in the Ninth Circuit, then, under the decision in *Turner v. Japan Lines, Ltd.*, *supra*, the longshoreman would have had a viable cause of action.

Similarly, in *Irby v. Tokai Lines*, Civil Action No. 88-6890 (E.D.Pa., Feb. 23 1990), 1990 U.S. Dist LEXIS 2116, a longshoreman was injured when steel coils on which he was standing collapsed because there was no cargo stowed underneath then. The District Court granted Summary Judgment under the authority of *Derr*. Had this case been brought in the Ninth Circuit, under *Turner v. Japan Lines, Ltd.*, *supra*, the injured longshoreman would have had a viable cause of action.

Similarly, in *Thomas v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7243 (E.D.Pa., Feb. 12, 1990), 1990 U.S. Dist LEXIS 1440, and *Davis v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7245 (E.D.Pa., July 31, 1990), 1990 U.S. Dist LEXIS 9898, two longshoremen were injured when steel pipe in a cargo stow gave way because it was improperly secured. The District Court granted Summary Judgment in favor of the shipowner on the authority of *Derr*, *supra*, although in the Ninth Circuit, these cases also would have stated a viable cause of action under *Turner v. Japan Lines*, *supra*.

In *Mullen v. Hoyu Kaiun Kabushiki Kaisha*, Civil Action No. 88-8311 (E.D.Pa., April 26, 1990), 1990 U.S. Dist LEXIS 5045, *affirmed by Judgment Order*, 922 F.2d 832 (3rd Cir. 1990), a longshoreman was injured when he tripped over a lashing wire used to secure cargo to the deck of the ship. It was alleged that this lashing wire had been negligently placed in positioned by a foreign loading stevedore in a manner such that it created a tripping hazard for

longshoremen walking on the ship's deck. Notwithstanding the fact that the lashing wire created a hazard on a "work space" of the ship, *i.e.*, the deck, the District Court granted Summary Judgment on the authority of *Derr* because the lashing wire had been placed in position by the loading stevedore.

In *Somenski v. Companhia de Navegacio Lloyd Brasilerio*, Civil Action No. 90-2737 (E.D.Pa., April 30, 1992), 1992 U.S. Dist LEXIS 6565, *affirmed by Judgment Order*, ___ F.2d ___ (3rd Cir. Oct. 14, 1993), two longshoremen were injured while attempting to discharge pipe which had been loaded aboard a ship in a foreign port in such a manner that the pipe could not be safely discharged. The District Court, on the authority of *Derr*, held that the shipowner had no duty with respect to the manner in which the cargo was stowed even though there was evidence that the ship's captain had inspected the stow in the loading port and was aware of how the cargo was stowed. The *Somenski* case clearly would have been decided differently had it arisen in the Fifth Circuit under the decision in *Woods v. Sammisa Co., Ltd.*, *supra*, with which it was factually similar.

The foregoing decisions have lead inexorably to the decision in the instant case. In the instant case, petitioner was injured when he slipped on a sheet of plastic that had been placed under cargo on the deck of the ship, even though, admittedly, the plastic should not have been put there. The presence of the plastic on the deck was not a condition which the discharging longshoremen had reason to anticipate or expect, as there was evidence that it was the practice to have paper or wood on the deck underneath cargo. Moreover, the plastic could only have been placed on the deck under the cargo at the time the cargo was loaded in the foreign port in Ecuador, and the plastic could only have been placed on the deck by the loading stevedore who necessarily, and admittedly, had to have obtained that plastic from the crew of the ship. Finally, there was evidence that the crew customarily observed the loading operation and would have known about the plastic being placed on the deck under the cargo. In any other Circuit but the

Third Circuit these facts would establish a *prima facie* case of vessel negligence. The extension of the *Derr* decision as the basis for granting summary judgment to the shipowner on this factual situation represents the final step in the Third Circuit's elimination of the longshoremen's negligence remedy contrary to the principles set forth by this Court in *Scindia*, *supra*, and in conflict with the decisions from every other Circuit which has had occasion to consider the issue.

It is abundantly clear from the cases cited herein that a significant number of injuries occur to longshoremen while engaged in discharging cargo as a result of hazardous conditions created by the manner in which the cargo was stowed in the loading port. In many instances, the existence of these hazardous conditions are not readily observable by the injured longshoremen as they are concealed by the cargo itself, and in other instances cargo may be loaded in a manner such that it cannot be discharged with reasonable safety. In either event, the ability of the injured longshoreman or his stevedore employer to do anything about such a condition is limited. Unsafe conditions created by the manner in which cargo is stowed can best, and most easily, be prevented at the time the cargo is loaded. To hold, as the Third Circuit has in *Derr*, that a shipowner bears no responsibility for the manner in which cargo is stowed results in exposing longshoremen to hazards which they can not avoid but which easily could be avoided by reasonable inspections by the ship's crew at the time the cargo is loaded.

It is apparent that the decision in *Derr* will continue to have significant impact on the rights of longshoremen in the Third Circuit who are denied a right of recovery by the decision in *Derr* but would have viable causes of action if they lived or brought suit in any other area of the country. Congress, in the Legislative History which accompanied the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act went out of its way to indicate that the negligence remedy which it was authorizing was to be

uniformly applied in the various ports of the country.[5] The conflict between the Third Circuit decision in *Derr* and the decisions from the Fourth, Fifth and Ninth Circuits in *Gill*, *Woods*, and *Turner*, respectively, demonstrate that this uniformity has not been achieved and will not be achieved until this Court grants certiorari and resolves this conflict. Accordingly, it is respectfully submitted that a Writ of Certiorari should issue to resolve this conflict in circuits.

2. The holding of the Third Circuit that evidence of the practice of the crew of a vessel to observe cargo loading operations does not create a duty of care with respect to conditions which might be reasonably discovered by such observations is in conflict with this court's decision in *Scindia Steam Navigation Company v. De Los Santos*, *supra*.

When this Court, in *Scindia*, held that a shipowner had no "general" duty to inspect or supervise the manner in which an injured longshoreman's stevedore employer performed cargo operations, it also recognized an exception to this general rule of no duty of inspection if there was evidence of "contract provision, positive law, or *custom* to the contrary," see 451 U.S. at 172 (Emphasis supplied).

Notwithstanding this clearly mandated exception to the general rule of no duty to inspect or supervise, the Third Circuit, in *Derr*, *supra*, held that evidence of the "general" practice in the maritime industry for the crew of a vessel to customarily observe the loading of cargo "can not be used

---

5.See House Report No 92-1441, 1972 U.S. Code Cong. and Adm. News at page 4705 (24a):

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

to reimpose the general duty to supervise the stevedore," see 835 F.2d at 494. Mindful of this holding, petitioner in the instant case offered testimony, not of a "general" custom to observe cargo loading operations, but, rather, of the "specific" practice on this specific ship with respect to observing cargo operations. In this regard, the Captain of the ship was asked, and testified, that it was the practice on the ship to have an officer and three seamen assigned to watch the cargo loading operation, and that if sheets of plastic had been placed on the deck during the loading operation, these crew members would have observed it being done and would have reported it to him or one of the ship's mates.[6]

Under Rule 406 of the Federal Rules of Evidence, this testimony by the ship's Captain was sufficient to establish that such observations were in fact conducted at the time the specific cargo involved in this case was loaded aboard the ship in Ecuador.[7] Thus, this evidence was sufficient, for purposes of opposing a motion for summary judgment, to establish that the crew of the vessel knew or had reason to know that plastic had been placed under the cargo at the time the cargo was loaded. Despite this, however, the District Court, affirmed by the Third Circuit, applied the *Derr* holding that the shipowner owed no duty of care to petitioner with respect to the manner in which the cargo was stowed.

---

6. The testimony of the ship's Captain on this point is set forth in Footnote 2, *supra* at page 5.

7. Rule 406 of the Federal Rules of Evidence provides:

> **Rule 406. Habit; Routine Practice**
>
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Whether or not proof of a "general" maritime practice of the crews of ships to observe cargo loading operations is sufficient to impose a duty of care on a shipowner with respect to cargo loading operations, proof of a "specific" custom or practice on a specific ship to observe cargo operations, coupled with proof of what those observations would be expected to disclose, as was presented in the instant case, clearly should be enough under this Court's decision in *Scindia* to establish the existence of a duty of care as to conditions which such observations might reasonably be expected to disclose. The failure of the Third Circuit to distinguish between evidence of a "general" practice with respect to making observations and the "specific" practice on a particular ship with respect to observing cargo operations is but another example of the Third Circuit's interpretation of *Scindia* in such a manner as to simply eliminate the longshoremen's negligence remedy. Because the decision below is so clearly in conflict with this Court's decision in *Scindia*, it is submitted that a Writ of Certiorari should issue to clarify what evidence is necessary to establish the existence of a "contract provision, positive law, or custom to the contrary" as that terminology is used in the *Scindia* decision.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
Continental Building,
Suite 900
400 Market Street
Philadelphia, PA 19106
(215) 931-2500
Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff,	:	CIVIL ACTION
v.	:	
BIRKDALE SHIPPING CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J. **OCTOBER ,1992**

Presently before this court is Defendant Birkdale Shipping Co.'s motion for summary judgment pursuant to Fed. R. Civ. P. 56. This court has jurisdiction over this matter under 28 U.S.C. § 1331 and § 1332.

This action arises out of the injury to Plaintiff, Albert Howlett, while discharging pre-slung cocoa beans from the No. 2 hold of the vessel M/V Presidente Ibanez. At the time of the incident the M/V Presidente Ibanez was owned and operated by Birkdale Shipping Co., S.A.[1] Plaintiff was employed as a longshoreman by Northern Shipping Co., a stevedore operating in the Port of Philadelphia.

The alleged accident is said to have occurred on July 28, 1989. In the hours before the accident, Plaintiff and other longshoremen were working in the tween deck of the No. 2 hatch hooking up four or five drafts of pre-slung bags of cocoa beans. While the first draft of cocoa beans were

---

1. The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion.

being lifted out of the hatch, plaintiff allegedly stepped down to the deck, upon which he allegedly slipped and fell.

Plaintiff contends that covering the deck was a layer of plastic. Plaintiff claims that he was not aware of the plastic and believed the deck to be covered by paper. It is customary to place paper and/or plywood under cocoa beans to protect against condensation. It is not customary to use plastic as a substitute for this purpose. Plaintiff asserts that the defendant was negligent in providing the stevedore with plastic instead of the usual paper or wood and in neglecting to warn the longshoremen that plastic was being used to protect the beans from condensation.

Defendants move for summary judgment claiming that as a matter of law they owed no duty of care to plaintiff. Defendants allege that the Longshoremen's and Harbour Worker's Compensation Act, 33 U.S.C. § 905(b), as amended in 1972, limits a shipowner's liability to acts of its own negligence and cannot be held liable for dangerous conditions arising from the acts of an independent stevedore.

Defendants claim that under Scindia Steam Navigation Ltd. v. De Los Santos 451 U.S. 156 (1981) and Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3d Cir. 1987) a vessel owner owes no duty in supervising the work of a stevedore, nor can he be held liable for such parties acts of negligence. Furthermore, Defendant points out that while they were the source of the plastic they were not responsible for, nor were they aware, of its intended use. They also claim that even if they were aware of the plastics intended use, this is not enough to impose liability. In order to be liable the shipowner would have to perform an act creating "an unreasonable risk of harm." Woods v. Partenreederei Ms. Yankee Clipper, 677 F. Supp. 46, 48 (D. Mass 1987). Defendant also asserts that regardless of their knowledge involving the use of the plastic, they were under no duty to warn as the condition was open and obvious.

In response Plaintiff asserts that there is sufficient evidence that Defendant had actual knowledge that the plastic was to be used in connection with the cocoa beans and that the condition was not "open and obvious", and therefore may be held liable.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and "'cannot simply reassert factually unsupported allegations contained in its pleading.'" William v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989) (citing Anderson, 477 U.S. at 249 and 323).

The Longshoremen's and Harbour Worker's Compensation Act, 33 U.S.C. § 901 et seq. defines the duty owed to longshoremen by vessels. The 1972 amendments to the Act reduced the liability of the shipowner and increased the opportunity to recover from the stevedore. Under the amendments, the shipowner could be held liable for his own

negligence, but not the negligence of the stevedore. 33 U.S.C. § 905(b); Woods, 677 F. Supp. at 47.

Scindia, the leading case on the duty a shipowner owes to its stevedore, held that the "vessel owes the longshoremen a duty to exercise due care 'under the circumstances'." Woods at 47. This level of care requires the vessel to be in working order so that an experienced stevedore is able to safely perform cargo operations. Id.

In this case Plaintiff is claiming that Defendant breached the duty to warn. In order to satisfy this claim it is necessary for plaintiff to show that defendant had actual knowledge of the condition and that it was not open and obvious.

Plaintiff asserts no factual basis for the claim that the vessel had actual knowledge that the plastic was being used in stowage for the cocoa beans. Plaintiff infers knowledge since the vessel was the source of the plastic. This assertion does not satisfy the standard of actual knowledge necessary to impose a breach of liability. As Defendant denotes, being the supplier of equipment does not necessarily imply knowledge of its intended purpose.

Secondly, Plaintiff asserts that Defendants knowledge can be found through the fact that Defendants crew were present during the loading of the cocoa beans. This assertion also does not satisfy the knowledge requirement. If it is true that the dangerous condition was apparent from the mere presence during the loading process, then it readily transpires that this was an open and obvious condition. Under Scindia, a shipowner is not liable for open and obvious conditions.

Plaintiffs have produced no evidence from which to find a genuine question of fact. Therefore, Defendant's Motion for Summary Judgment shall be GRANTED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff,	CIVIL ACTION
v.	
BIRKDALE SHIPPING CO., S.A., Defendant.	NO. 91-7978

ORDER

AND NOW, this 1st day of October, 1992, in consideration of Defendant's Motion for Summary Judgment, Plaintiff's Answer thereto, Defendant's Reply, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

BY THE COURT:

/s/ James McGirr Kelly
James McGirr Kelly, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

ORDER

Before the Honorable James McGirr Kelly

AND NOW, this 1st day of October, 1992, in accordance with the Court's Order of October 1, 1992,

IT IS ORDERED that judgment be and the same is hereby entered in favor of defendant Birkdale Shipping Co., S.A. and against plaintiff Albert Howlett.

BY THE COURT

ATTEST: /s/ Arlene L. Quinn
Arlene L. Quinn
Deputy Clerk

Civ 1 (8/80)

ENTERED: 10/2/92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

MEMORANDUM

J. M. Kelly, J.

Presently before the court is Plaintiff Howlett's Motion for Reargument of the court's Order, dated October 1, 1992, granting Defendant Birkdale Shipping Company's Motion for Summary Judgment. For the following reasons, the motion will be denied.

Plaintiff filed a complaint against Empresa Maritima Howlett v. Empresa Maritima, 92cv4245, on July 22, 1992. This complaint was based on the same facts and circumstances as the present action. On November 10, 1992, an Order was issued by this court to consolidate the cases for all purposes.

Plaintiff Howlett does not specify what rule of Federal Civil Procedure or Local Rule of the United States District Court for the Eastern District of Pennsylvania he invokes for her motion. Nonetheless, "any kind of motion that draws into question the correctness of the district court judgment is considered to be a motion to alter or amend the judgment under Civil Rule 59(e)." 16 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 3950, at 364 n.7. The purpose of a motion for reconsideration is to correct errors of law or fact, or to present newly discovered evidence. Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D. Ill. 1983),

aff'd, 735, F.2d 1367 (7th Cir. Ill., May 29, 1984) (No. 83-1492).

An order granting summary judgment was issued on October 1, 1992. The court found that actual knowledge could not be imputed to the vessel owner and that the accident occurred as the result of an open and obvious condition.

In support of the instant motion, Plaintiff asserts that there has been a misapplication of the law to the facts of the case. Plaintiff contests the courts' finding the condition to be open and obvious, as well as, the failure to impute actual knowledge on the vessel owner.

Plaintiff submits no new evidence in support of this motion. Additional law has been found to supports the courts findings in the original memorandum and order. See Trinidad Pimental v. Canadian Pacific Bulk Ship Service and M/V Fort Nanaimo, CV NO. G-89-162, (S.D. Tx. filed July 19, 1991). Finding the law to have been appropriately applied to the facts of the case, Plaintiff's motion for reargument shall be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

ORDER

AND NOW, this 23rd day of November, 1992, in consideration of Plaintiff's Motion for Reargument, Defendant's Reply, Plaintiff's Response, thereto, Defendant's Supplemental Brief, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Plaintiff's Motion for Reargument is DENIED.

BY THE COURT:

James McGirr Kelly
James McGirr Kelly, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 91-07978 & 91-04245)
District Judge: Honorable James McGirr Kelly

Argued June 21, 1993

BEFORE: STAPLETON, MANSMANN and
HUTCHINSON,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court dated November 24, 1992, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

ATTEST:

/S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

Dated: July 30, 1993

Excerpt from testimony of Albert Howlett

Q. Before you stepped down from the cocoa beans to the plastic, were you aware that there was plastic there?

A. No.

Q. When you stepped down from the cocoa beans to the plastic, where were your eyes directed?

A. Where were my eyes directed?

On the draft.

Q. Did you look down at all before you stepped down into --

A. Yes. As I was coming down, yes.

Q. Did you look down to the skin at any point before you stepped down into that empty space?

A. Back that up please.

Q. Before you stepped from the cocoa beans down into the space where this draft had been located, at any time did you direct your eyes to what would have been normally the skin?

A. Yes.

Q. When you did that, did you observe the plastic?

A. No.

Q. Why did you not see the plastic?

A. Well, it was dirty. I guess I really didn't think it was plastic. I really didn't think it was plastic.

Q. What did you think it was?

A. I thought it was paper.

Q. I don't think I've got a full appreciation of what the plastic looked like. You said it was dirty. Can you describe it any better than that?

A. It was dirty and there was debris on it, you know.

Q. Was it clear plastic or was it a dark plastic?

A. I guess a dirty piece of plastic. I guess clear. I guess clear.

Q. When you say "dirty." What --

A. From the cocoa beans, just the dirt.

Q. Was there dust on it or was it just dirt?

A. Yes, it was dust, dirt, cocoa beans, you know, the whole bit.

Q. Was it dirty in one area or the entire thing?

A. It was dirty all over.

Excerpt from testimony of
Captain Daniel Cafena Campos

Q. In stowing cocoa bean, was it the practice on the IBANEZ to always use paper on the deck?

A. First wood and then paper.

Q. Why wood and then paper?

A. So the paper would have a better resistance. If not, it would break.

. . . .

Q. . . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

A. Normally be three sailors and one guard, an officer.

. . . .

Q. So that it would be fair to say -- strike that. You have three men, three seamen and a mate, an officer -- you have three seamen and an officer assigned to watch the four cargo holds?

. . . .

A. Yes. Because many strangers or strange people could enter. There would be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

Q. And that would start from the beginning -- from the time

the longshoremen come on the ship until the longshoremen finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

. . . .

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

A. Please remind me. What practice are you referring to?

Q. The practice of having the crew members watch the loading and to watch to see what was placed on the deck.

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

. . . .

A. Yes.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

A. Affirmative. And he would have advised me or one of the ship's mates.

LONGSHORE'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HOUSE REPORT NO. 92-1441

(as reported at 1972 U.S. Code Cong. and Adm. News beginning at page 4698)

* * *

[4701]

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to long-

[4702]

shoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional

seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were not being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in

such cases. The Committee also heard testimony

[4703]

that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia*

[4704]

Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the

vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

[4705]

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yuka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship build-

ing or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption to risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.